COMMONWEALTH OF VIRGINIA

STATE CORPORATION COMMISSION

AT RICHMOND, JUNE 5, 2002

APPLICATION OF

CINCAP MARTINSVILLE, LLC CASE NO. PUE-2001-00169

For a certificate of public convenience and necessity for electric generation facilities in the City of Martinsville

ORDER ON MOTION

On March 27, 2001, CinCap Martinsville, LLC ("CinCap" or "Applicant") filed an Application with supporting testimony and exhibits requesting that the Commission grant it a certificate of public convenience and necessity under the Utility Facilities Act to construct, own, and operate a 330 MW natural gas-fired electric generating facility ("Facility") at the Commerce Court Industrial Park in the City of Martinsville, Virginia. The Applicant also seeks an exemption from the provisions of Chapter 10 of Title 56, pursuant to § 56-265.2 B of the Code of Virginia ("Code"), and interim approval to make financial expenditures and undertake preliminary construction work, pursuant to § 56-234.3 of the Code. The Application was supplemented on May 10, 2001.

On May 18, 2001, the Commission entered an order requiring CinCap to provide public notice of its Application, establishing a procedural schedule for the filing of testimony and exhibits, scheduling an evidentiary hearing, and appointing a Hearing Examiner to hear this case. The evidentiary hearing was held on September 18, 2001, before Chief Hearing Examiner Deborah V. Ellenberg. On January 31, 2002, Examiner Ellenberg entered a Report that summarized the record, analyzed the

evidence and issues in this proceeding, and made certain recommendations, including that the Application should be granted with conditions.

On April 29, 2002, a majority of the Commission entered an order that: (1) permitted CinCap to make financial expenditures and undertake certain preliminary construction work without prior approval from the Commission; and (2) remanded this case to the Hearing Examiner for further proceedings with respect to consideration of cumulative air impacts, and asked the Hearing Examiner to expedite this matter. On May 17, 2002, CinCap filed a Motion for Reconsideration ("Motion") of that order, requesting the Commission: (1) to reconsider and reverse its April 29, 2002, order; and (2) to grant CinCap authorization to construct, own, and operate the Facility in accordance with the findings and recommendations in the Hearing Examiner's Report.

NOW THE COMMISSION, having fully considered all of the arguments in CinCap's Motion, hereby denies CinCap's request to reverse our April 29, 2002, remand order. Contrary to CinCap's assertion, the remand order does not violate due process. The Commission possesses the discretion to determine that we must evaluate cumulative air impacts in this proceeding to carry out our obligations under the statutes and policy of the Commonwealth. Such a decision is not a rulemaking. Rather, the Commission has the authority to identify the factual matters that we must consider in performing our statutory duties in this proceeding. Further, we are providing CinCap a full opportunity to introduce evidence and be heard on cumulative air impacts. The remainder of this order addresses specific arguments included in the Motion.[1]

CinCap contends that we have erred by considering Article XI, § 1, of the Constitution of Virginia. More specifically, CinCap suggests that the main, if not sole, basis for our requirement of a

[1] CinCap also requests confirmation that the remand order "is limited to requiring evidence of cumulative impacts on air quality only." Motion at 8, n.16. We believe that our remand order clearly explains that the case was remanded to consider cumulative air impacts only; to the extent clarification is necessary, we confirm this as requested by CinCap.

cumulative air impact analysis in Tenaska[2] and the instant case is Article XI, § 1, of the Constitution. CinCap states that the constitutional provision is not self-executing and that, "[a]ccordingly, the means and criteria for its implementation must be found in the specific statutes which delegate the jurisdiction to enforce it."[3] In other words, CinCap asserts that the Commission should not and cannot consider the policy enunciated in the Constitution as we carry out our obligations under § 56-46.1 of the Code.

CinCap is incorrect with respect to the basis of our actions in Tenaska and this case, as well as the law. First, we agree that Article XI, § 1, is not self-executing. We have never suggested otherwise. This constitutional provision was neither the sole, nor main, basis for the cumulative air impact analysis. Rather, we required such analysis in carrying out our obligations under § 56-46.1. This provision requires the Commission to "give consideration to the effect of [the] facility on the environment." Further, we are obligated thereafter to "establish such conditions as may be desirable or necessary to minimize adverse environmental impact."

In carrying out those obligations, we considered and were guided by the policy of the Commonwealth set forth in the Constitution. Contrary to the arguments of CinCap, the Supreme Court of Virginia has explicitly recognized that such consideration and guidance is proper in cases such as this. In Rappahannock League for Envtl. Protection, et al. v. Virginia Elec. and Power Co., 216 Va. 774 (1976) ("Rappahannock League"), Virginia Electric and Power Company requested approval, under the Utility Facilities Act and § 56-46.1 (the same statutory scheme under which CinCap filed its application herein), to construct electric transmission facilities. The Court found that the issues in the

[2] Application of Tenaska Virginia Partners, LP, For approval of a certificate of public convenience and necessity pursuant to Virginia Code § 56-265.2, an exemption from Chapter 10 of Title 56, and interim approval to make financial commitments and undertake preliminary construction work, Case No. PUE-2001-00039, Order (Jan. 16, 2002) ("Tenaska").

[3] Motion at 10.

case were developed under Article XI, § 1, and under the foregoing statutes. Specifically, the Court stated the following:

> "Under the applicable constitutional provision, Va. Const. art. XI, § 1, and the foregoing statutes [(i.e., §§ 56-46.1 and 56-265.1 et seq.)], three broad issues developed in this case …."[4]

Accordingly, the Court explicitly acknowledged that the policy set forth in Article XI, § 1, is relevant to our evaluation of such applications under Virginia statutes.[5]

We also reject CinCap's assertion that § 56-46.1 prohibits this Commission from evaluating cumulative air impacts as part of our consideration of the effect of the Facility on the environment, and as part of our evaluation of conditions that may be desirable or necessary to minimize adverse environmental impact. To the contrary, our consideration of the effect of the Facility on the environment, and of possible conditions to minimize adverse environmental impact, should take into account factors that are relevant to those evaluations. Section 56-46.1 does not require us to perform our mandates under that statute in a vacuum. Further, § 56-46.1 does not prohibit us from evaluating the Facility's potential impact, in conjunction with other facilities, on the environment – nor does it prohibit us from evaluating cumulative impacts in determining conditions that may be desirable or necessary to minimize adverse environmental impact. Indeed, we have determined that such evidence is necessary for us to properly carry out our statutory obligations in this case.

CinCap also states that the record fully addresses impacts on air quality, and that the issue of cumulative air impacts was not raised by any participant in this case. CinCap asserts that the record in

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[4] Rappahannock League at 777.

[5] In addition, our consideration of this constitutional policy in implementing our statutory obligations is far different from the situation in Robb v. Shockoe Slip Foundation, 228 Va. 678 (1985) ("Robb"), which is relied upon by CinCap. In Robb, the Supreme Court reversed the chancellor below, finding that the chancellor in effect ruled Article XI, § 1 – standing alone – required an environmental impact statement. Robb at 683. To the contrary, and as discussed above, we have not found that Article XI, § 1, requires a cumulative air analysis. Rather, it is our obligations under § 56-46.1 that led us to require the cumulative impact analysis.

this case is more than sufficient to satisfy the standards applied by the Commission in previous merchant plant certification cases, in which no evidence of cumulative impacts on air quality was considered necessary. Thus, CinCap suggests that our remand violates due process. The nature of this case, however, is not "plaintiff v. defendant." The Commission's statutorily mandated consideration of the Facility is not limited to matters that the participants choose to raise in the first instance. Moreover, the Commission has discretion such that its views may evolve with respect to the matters it must consider to properly implement our statutory obligations in evaluating proposed facilities. For example, the factors warranting our determination that cumulative impact evidence is necessary in this case include the significant number of generating plant applications before us (of which we can take judicial notice), and the fact that Virginia statutes have changed to no longer require a showing of any need for, or any obligation to provide, the plant's output for use by Virginia's businesses and citizens.

CinCap further asserts that the remand order violates the Virginia Constitution, Virginia statutes, the Commission's rules, and the basic due process provisions of the United States and Virginia Constitutions. CinCap states that the Commission violated these provisions by converting the Tenaska remand order into a general rule of retroactive application. Our decision in Tenaska, however, is not a rule of general application under Article IX, § 3, of the Constitution of Virginia or § 12.1-28 of the Code. Rather, in our order remanding this case, as in our Tenaska remand, we found that to comply with our obligations, we need to consider cumulative air impacts. These decisions clearly are within the Commission's discretion in carrying out our statutory duties.

In this regard, CinCap attempts to distinguish Roanoke Gas Co. v. State Corp. Comm'n, 225 Va. 186 (1983) ("Roanoke Gas"), but it cannot. In Roanoke Gas, the Supreme Court held that the Commission's imposition of a new threshold test for its Financial Operating Review program was not a rule or regulation, but rather "nothing more than a discretionary method of determining whether a rate

change is needed."[6] Likewise, the Commission clearly has the discretion, without a rulemaking, to determine that a record before it is deficient with regard to a component of its duties and to permit the applicant an opportunity to supplement that record.

CinCap's reliance on Virginia Elec. and Power Co. v. State Corp. Comm'n, 226 Va. 541 (1984) ("VEPCO") also is misplaced. Indeed, our April 29, 2002, remand order is fully consistent with procedural requirements affirmed by the Supreme Court in that case. In VEPCO, the applicant filed for a change in rates. Three weeks after the filing, the Commission: (1) summarily denied an increase in equity return based on the pre-filed evidence and the Commission's own knowledge of the cost of capital; and (2) severed a second rate component, regarding the cancellation of a nuclear unit, into a separate investigation. The Supreme Court found that: (1) the summary denial of an increase in equity return did not afford the applicant procedural due process, and should be reversed and remanded to the Commission;[7] and (2) the order severing the nuclear unit issue for further proceedings was constitutionally sufficient, afforded a full opportunity to subsequently introduce evidence and be heard, and should be upheld.[8] In the instant case, the Commission has not summarily denied CinCap's request to construct facilities. Rather, we have afforded the Applicant a full opportunity to introduce evidence and be heard on the issue of cumulative air impacts. Such a procedure, which provides a full opportunity to be heard, was expressly upheld by the Supreme Court in VEPCO.

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[6] Roanoke Gas at 189-190.

[7] Deciding that cumulative air impact evidence is needed in this proceeding, and providing an opportunity to present evidence and be heard, is not the equivalent of denying an increase in equity return without an opportunity to be heard. Nor is the remand to the Hearing Examiner to receive evidence on cumulative air impacts a denial of "an opportunity to introduce evidence and be heard" prior to entering "any finding, order, or judgment" against the Applicant. See Article IX, § 3, of the Constitution of Virginia; § 12.1-28 of the Code; and Motion at 16.

[8] VEPCO at 549.

CinCap also asserts that the pending case on filing requirements for generating facility applications prohibits the Commission from considering cumulative air impacts in CinCap's proceeding.[9] CinCap relies upon "the Commission's statement in the Rulemaking Order that cumulative impacts would be addressed on a case-by-case basis in those cases where the issue had been raised."[10] Such a "statement" by the Commission simply does not exist. Rather, that order recognized that a "number of applications are presently pending before the Commission."[11] The order explained that "[i]ssues in those cases may relate to … matters included in the proposed rules we offer for publication and comment today."[12] Finally, that order expressly stated that "[n]either the adopted nor proposed rules limit what we may consider in those pending cases; such matters or issues will be considered on a case-by-case basis in each proceeding."[13] There is no "statement" in that order limiting our review, as to matters in the proposed filing requirements, only to cases "where the issue had been raised." To the contrary, our remand of this case to consider cumulative air impacts is fully consistent with our statements in the Order Adopting Rules and Prescribing Additional Notice. We also reject any suggestion by CinCap that filing requirements, either proposed or adopted, place a limit on the evidence that the Commission may find relevant and necessary in cases before it.

Finally, our discussion herein is based on the law as it currently stands. As noted in our remand order in this case, § 56-46.1 obligates us to receive and give consideration to reports

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[9] See Ex Parte: In the matter of amending filing requirements for applications to construct and operate electric generating facilities, Case Nos. PUE-2001-00313 and PUE-2001-00665, Order Adopting Rules and Prescribing Additional Notice (Dec. 14, 2001) ("Order Adopting Rules and Prescribing Additional Notice").

[10] Motion at 15-16 (emphasis added).

[11] Order Adopting Rules and Prescribing Additional Notice, at 7.

[12] Id.

[13] Id.

from the Commonwealth's environmental agencies. Chapter 483 of the Acts of Assembly, (2002 Va. Acts 483 ("Chapter 483")), modifies the statutory scheme under which we will receive and give consideration to the environmental impacts of applications such as CinCap's. Chapter 483 both establishes authority in the DEQ to conduct cumulative impact analyses as well as requires the Commission to defer to other governmental entities, and it is not our intent to duplicate activities already undertaken by other governmental entities. Chapter 483 is not effective until July 1, 2002, and we have not received information developed as envisioned therein in this case. Accordingly, our remand order established a procedure by which CinCap could proceed under existing law. If CinCap, however, wishes to comply with Chapter 483 and have this case considered under the new statute on or after July 1, it may choose to do so.

Accordingly, IT IS ORDERED THAT:

(1) CinCap's Motion for Reconsideration is denied.

(2) This matter is continued.

AN ATTESTED COPY hereof shall be sent by the Clerk of the Commission to: Stephen H. Watts, II, Esquire, McGuireWoods L.L.P., One James Center, 901 East Cary Street, Richmond, Virginia 23219-4030; Guy T. Tripp, III, Esquire, Hunton & Williams, Riverfront Plaza, East Tower, 951 East Byrd Street, Richmond, Virginia 23219-4074; and the Commission's Divisions of Energy Regulation, Economics and Finance, and Public Utility Accounting.

Morrison, Commissioner, Dissenting Opinion.

I respectfully dissent from the Majority's decision to deny reconsideration and reversal of the April 29, 2002, Order remanding this proceeding to the Hearing Examiner.

I find nothing in the Majority Order denying reconsideration to cause me to alter my views as set forth in my Dissenting Opinion to the Remand Order. I also reference my Dissenting Opinion in the Application of Tenaska Virginia Partners, L.P., Case No. PUE-2001-00039, for a more detailed discussion of subject matter having relevance to this case.

The Motion for Reconsideration is well reasoned and persuasive, a conclusion which will come as no surprise to anyone. Section IV of the Motion demonstrates how extremely unfair it is to an applicant for this Commission to preempt its own rulemaking process and retroactively install the 2002 vintage cumulative impact requirement with no opportunity whatsoever to the applicant to respond before the remand order. I do not think that Roanoke Gas Co. v. State Corp. Comm'n, 225 Va. 186 (1983) ("Roanoke Gas"), can possibly support such free-ranging course changes. That case was essentially a rate setting matter, the type in which appellate courts give wide discretion to utility regulatory bodies when they endeavor to establish just and reasonable rates. It was a case in which Roanoke Gas was not blind-sided by a new and substantially more onerous requirement after the evidentiary hearing was closed. In Roanoke Gas the dispute was essentially the matter of the accounting system the Commission chose to recognize, and that recognition was not done against the backdrop of a pending rules proceeding dealing with the same subject matter.

In this case we are dealing with an entirely different regulatory animal. This is an application for a Certificate of Public Convenience and Necessity, a valuable property right, and I find that the Motion for Reconsideration is correct in its characterization of Roanoke Gas being distinguishable.

On July 1 of this year, by virtue of a new code section, § 10.1-1186.2:1, executive branch agencies will consider the cumulative air impact of new and proposed electric generating facilities to the exclusion of such consideration by this Commission. That day will come in less than one month now, and it is quite difficult to understand why the Majority does not take this opportunity to allow this peaking plant project to proceed without further delay.